‘Not Time to Make a Change’?
Reviewing the Rhetoric of Law Reform

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Abstract: How do we talk about changing the law? This article considers the rhetoric of law reform and what it can tell us about the current relationships between key institutions involved in the relevant processes. A key claim is that the rhetoric deployed in formulating proposals can complicate the fate of law reform projects as they develop. Several examples from private and criminal law are used to support the argument, with assessment of the interaction of time and legal development. The language of ‘modernisation’—a noticeable theme in contemporary proposals from the Law Commission of England and Wales—is scrutinised. The Commission's statutory functions expressly include ‘the repeal of obsolete and unnecessary enactments… and generally the simplification and modernisation of the law’, but what ‘modernisation’ means in this area has, so far, been under-examined. The author then goes on to identify attitudinal and structural tensions in the current relationship between the Law Commission and Government. Constructive suggestions are offered for reforming our law reform practices. The way in which we talk about law reform can be understood as both a cause and symptom of some of the problems in developing the law today.

Key words: Law Commission; law reform; time and law; law and technology; rhetoric; legal institutions.

It’s not time to make a change
Just relax, take it slowly
You’re still young, that’s your fault
There’s so much you have to go through¹

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¹ Cat Stevens, ‘Father and Son’ 1970.
1. Introduction

This article examines the rhetoric of law reform, and how it relates to the development of the law, our legal institutions and our legal imagination.\(^2\) I focus in particular upon the work of Law Commission of England and Wales (‘The Law Commission’), our independent, statutory law reform body, and its relationships with its audiences. As a case study, I scrutinise the language of ‘modernisation’—a noticeable theme in contemporary proposals from the Law Commission, especially where the legislation can be characterised as ‘Victorian’.\(^3\) My thesis is that the framing of projects in terms of modernisation is a successful initial tactic, notably when dealing with politicians and the wider public. However, the strategy brings concomitant challenges for the selection, evolution and delivery of projects and the reception of any recommendations by government, Parliament, the courts, consultees and the wider public.\(^4\) Goode observed that the Law Commission has ‘over the years succeeded in the difficult art of combining scholarship with pragmatism’.\(^5\) My concern is that such successful pragmatism (and indeed even a sophisticated communications strategy) may have wider consequences.

Rhetoric is the art of effective and persuasive communication, by studying the techniques and devices used. Through interrogating the rhetoric used in arguments about changing the law, I shall offer a fresh perspective on current scholarly debates, and add to the existing literature on law reform since the Law Commissions Act 1965 created the

\(^2\) For a highly illuminating analysis of the role of imagination in law reform, in the context of environmental law, see E Fisher, “Going Backward, Looking Forward”: An Essay on How to Think about Law Reform in Ecologically Precarious Times” (2022) 30 New Zealand Universities Law Review 111, eg at 129 ‘Legal imagination is a feature of all law… An act of legal inquiry is an act of envisaging the possibilities of what law is and how it can be applied’.

\(^3\) As explored in section 5 below, this labelling of ‘Victorian’ is used literally where some relevant legislation can be found to date from the reign of Queen Victoria, and for the overtones of being archaic and in need of reform.

\(^4\) I have examined the relationship between the courts and the Commission elsewhere, so here I mainly consider the Commission’s interaction with Government and Parliament: J Lee, ‘The Etiquette of Law Reform’ in M Dyson, J Lee and S Wilson Stark (eds), Fifty Years of the Law Commissions: The Dynamics of Law Reform (Hart 2016), and J Lee, ‘Illegality, Familiarity and the Law Commission’ in S Green and A Bogg (eds), Illegality After Patel v Mirza (Hart 2018). For a recent example of judicial consideration of the work of the Law Commissions, see the differing views of Lord Hodge and Lady Arden in BTI 2014 LLC v Sequana SA [2022] UKSC 25 (involving a project on which each of them had been involved as members of their respective Commissions).

Law Commission. One seam concerns the respective roles of our institutions: how they develop the law, and how they relate to one other in the context of change. Then there are analyses of various intersections and interactions: between technology, regulation and law; between time and the law; and between law and politics. Finally, there are of course debates about the law within the areas which may be the target of reform.

The next two sections offer background history and context to the evolution of the language of law reform. I then turn to some substantive examples from recent law reform projects. The Commission's remit extends to ‘taking and keeping under review all the law’. Since ‘all the law’ would be slightly more than can be embraced in a single article, I must be selective, and so in sections 4 and 5, I give particular attention to trusts and the law of wills as illustrations of the rhetorical challenges. Having shown the importance of rhetoric, I then move in section 6 to make some criticisms of the present state of the system of law reform, and the attitude of government towards the Commission. My analysis demonstrates a pattern of serious erosion of respect for the institutional mechanisms of independent law reform.


7 See generally Lady Hale, ‘Fifty Years of the Law Commissions: The Dynamics of Law Reform Now, Then and Next’ in Fifty Years of the Law Commissions (n 4) 25.

8 I make no claim that law reform only originates with the Law Commission—Government initiatives, whether as manifesto commitments or departmental initiatives during the course of a Parliament, even Private Member’s Bills are also engines of reform, but the institutional dynamics are not the same as reform driven by the independent reform body.


11 For the political dimensions of ‘digital lifeworld’, see the insights of J Susskind, Future Politics (OUP 2018).

12 Law Commissions Act 1965, s 3(1).

13 In the debate on the Bill that became the Law Commissions Act 1965, Lord Wilberforce made his maiden speech in the House of Lords, noting ‘Almost everybody is his own armchair law reformer; everybody has his hobby horse in the way of law reform’; HL Deb 1 April 1965, vol 264, col 1173.
It is an especially timely moment to consider the state of play because of the fate of the Commission’s putative next programme of law reform, its Fourteenth since 1965. The Commission is required by statute to set out programmes of reform\textsuperscript{14} (in addition to individual projects), and agrees such programmes with the Lord Chancellor.\textsuperscript{15} The timetable for agreeing the programme was extended in 2022\textsuperscript{16} because the Commissioners had concluded that ‘now is not the time to set in stone a list of projects… to do so will reduce our capacity to respond flexibly to law reform needs arising in the near future’.\textsuperscript{17} The finalisation has since been deferred altogether until the end of the current Parliament.\textsuperscript{18}

‘\textit{Change is one of the abiding characteristics of law},’\textsuperscript{19} and so if it’s not time to make a change, when will it be?

In considering the impact of timing, I also make constructive suggestions for reforming our law reform practices. The way in which we talk about law reform can, I argue, be understood as both a cause and symptom of some of the problems in developing the law today.

\section*{2. Key Themes: Law Reform Ancient and Modern}

\textbf{A. Bentham, Brougham and Legacies of Reform}

Inspired no doubt by Jeremy Bentham’s connection with the origins of University College London, the challenge of law reform has been a consistent theme in this Current Legal Problems series, including contributions from academics,\textsuperscript{20} serving and former Commissioners\textsuperscript{21} and

\begin{itemize}
\item Law Commissions Act 1965, s 3(1)(b) (‘programmes for the examination of different branches of the law with a view to reform’) and (d) (‘comprehensive programmes of consolidation and statute law revision’).
\item Law Commissions Act 1965, s 6(2).
\item Sir Nicholas Green (n 16).
\item See section 6D below.
\end{itemize}
serving and former Chairs of the Commission.\textsuperscript{22} The very first volume of \textit{Current Legal Problems} 75 years ago contained insightful contributions from both HF Jolowicz\textsuperscript{23} and RH Graveson,\textsuperscript{24} with the latter noting:

the common law in every age has seemed to embody corresponding maturity and perfection. Such is its nature that it has been able to advance its frontiers to keep in sight of, if not to keep in line with, changing social and economic conditions.\textsuperscript{25}

As early as 1967, Marshall, when lecturing on the Law Commissions in this series, confessed that he had originally ‘formed the opinion that another lecture on law reform in this series would be superfluous’.\textsuperscript{26} In offering yet another such essay, I would argue that the exercise of law reform is both a \textit{current} and a \textit{perennial} legal problem. My other claim to currency is that there are several features of the present state of government engagement with its statutory body dedicated to law reform that require significant change. In seeking to understand legal change, we must appreciate and examine the role of institutions, as Paul Mitchell has argued: ‘[changing] law is fundamentally a collaborative activity, which involves a multiplicity of interactions both instantaneous and long term between individuals, institutions, and texts’.\textsuperscript{27}

Judson once wrote that ‘the history of the law reforms of Jeremy Bentham is full of encouragement to those reformers who find themselves in advance of the public opinion of their own time’.\textsuperscript{28} Bentham lived until 1832, and the nineteenth century would go on to be ‘remarkable for a heavy flood of wide-ranging, elaborate legal reform inspired and guided by the great figures of the profession’.\textsuperscript{29} In February 1828,
before even the reign of Queen Victoria, Henry Brougham, MP for Winchelsea, later Lord Chancellor, gave the longest speech in UK Parliamentary history, on the subject of reform.\textsuperscript{30} His speech lasted for six hours and he criticised an unthinking and more dangerous prejudice... I mean the outcry against innovation, set up as often as any one proposes those reforms, rendered necessary by the changes that time, the great innovator, is perpetually making.\textemdash \textit{Tempus novatur rerum}\textsuperscript{31}

Brougham went on to spend four years as Lord Chancellor, and after that service had a career in the Lords where he sought to promote reform in various areas of the law, although his personal record may be regarded as mixed.\textsuperscript{32} Bentham, who engaged actively with politicians to promote his own causes, had a fractious relationship with Brougham, as he thought Brougham’s changes were insufficiently ambitious in terms of scale and content. He asserted that Brougham was ‘not the Messiah of law reform’.\textsuperscript{33}

We shall see recent examples in the sections which follow, but the use of the reign of Victoria as an historical comparator can be seen in the Hamlyn lectures of the Commission’s first Chairman, Sir Leslie Scarman: ‘it would be wrong, I submit, to assume that the nineteenth century view of the common law … is necessarily correct or complete’.\textsuperscript{34}

B. Modernisation

The word ‘modernisation’ is not defined in the Law Commissions Act 1965: during debates on the Bill that became the Act, Viscount Simonds deprecated ‘the rather grandiloquent language of … modernisation and systematic development’.\textsuperscript{35} ‘Modernisation’ is an idea often espoused by politicians in campaign rhetoric: there have been political studies of

\textsuperscript{30} HC Deb 7 February 1828, vol 18, cols 128–248.
\textsuperscript{31} Brougham (n 30) 140.
\textsuperscript{32} See the leading work of M Lobban: ‘Henry Brougham and Law Reform’ (2000) 115 English Historical Review 1184, and “Old Wine in New Bottles”: The Concept and Practice of Law Reform, c. 1780–1830’ in A Burns and J Innes (eds), Rethinking the Age of Reform (CUP 2009) 121ff.
\textsuperscript{34} L Scarman, English Law – The New Dimension (Stevens & Sons 1974) 16.
\textsuperscript{35} HL Deb 1 April 1965, vol 264, col 1185.
NewLabour communication around modernisation.\textsuperscript{36} Ideas and ideals of modernisation as a social scientific theory can be found in works on law and social theory,\textsuperscript{37} and on historiography.\textsuperscript{38} The contributions made by such works illustrate the contestability of the ideas: my study complements them, by examining the ways in which modernisation rhetoric bears upon the business of law reform.

The Law Commission is usually said to be restricted in its project choices to ‘lawyers’ law’\textsuperscript{39}: it has ‘generally avoided projects which have at their heart major issues of social policy, morality or political controversy’.\textsuperscript{40} What ‘lawyers’ law’ means can vary over time,\textsuperscript{41} just as what is deemed political or non-controversial can change over time, and the boundaries may be porous.\textsuperscript{42} The real issue is where to draw the line as to which projects the Commission can take on. Some draw the line as avoiding party politics\textsuperscript{43} (whether as a general matter or where specific positions have been adopted)\textsuperscript{44}, the Haldane Society’s Committee, in


\textsuperscript{37} For example, RM Unger, Law in Modern Society: Toward a Criticism of Social Theory (The Free Press 1976); G Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 Law & Society Review 239.

\textsuperscript{38} See, eg, J Innes, “Reform” in English Public Life: The Fortunes of a Word’ in Rethinking the Age of Reform (n 32). For a sceptical view on modernisation theory with respect to the Victorians, see A Hawkins, Modernity and the Victorians (OUP 2022), especially chs 4 and 5.


\textsuperscript{40} Sir D Lloyd Jones, ‘Looking to the Future’ in Fifty Years of the Law Commissions (n 4) 358. M Partington, ‘Law Reform: The UK Experience’ in M Tilbury, SNM Young and L Ng (eds), Reforming Law Reform: Perspectives from Hong Kong and Beyond (Hong Kong University Press 2014) 76.

\textsuperscript{41} For criticism of referring to ‘lawyers’ law’ in this context, see G Gretton, ‘Of Law Commissioning’ (2013) 17 Edin LR 119 at 127 ‘Nobody speaks of plumbers’ plumbing: lawyers’ law is as absurd’, and L Scarman, Law Reform: The New Pattern (Routledge & K Paul 1968). Thank you to an anonymous referee for these references.

\textsuperscript{42} (Viscount) Kilmuir, ‘Law Reform’ (1957) 4 Journal of the Society of Public Teachers of Law (NS) 75.

\textsuperscript{43} For example, Marshall (n 20) 65.

the original collection of *Law Reform Now*\(^{45}\) in 1947, framed it as ‘carrying through measures of law reform which do not involve strong electoral feelings’\(^{46}\); others would view it more as involving an analysis of the specific possible project, ‘based on the degree of legal content alongside social or political factors’.\(^{47}\)

Sometimes invoking modernisation involves an appeal to the mere passage of time. That may particularly be the case at the conception of projects and the initial pitch to, or from, government, as a way of making projects more eye-catching. While there may be more details to substantiate any given project, one concern I have is that modernisation operates as a heuristic. For example, the Eighth Programme included a reference to both Commissions from the Department of Trade and Industry for a review of Partnership Law: ‘The Partnership Act dates from 1890. We are reviewing the general law of partnership to enable it to meet the needs of business over a century later’.\(^{48}\) The word ‘modern’ or its derivations\(^{49}\) appear 22 times in the Thirteenth Programme paper, and 56 times in the 2021–22 Annual Report.\(^{50}\)

It is also understandable for law reform commissions to point to factors seemingly external to the law as justifying looking again at legal doctrines, rather than pointing only to scope for improving the internal coherence of the law. As Hon Michael Kirby, former Justice of the High Court of Australia and former Chair of the Australian Law Reform Commission has observed, ‘Almost every task of the [Australian Law Reform] Commission evidenced the impact of science and technology on the law’. His Honour continued that ‘impact [was not] confined to the halls of academe or the bearded meetings of law reformers’,\(^{51}\) for it bears on real, active issues that matter to business and the general public.

The language of modernisation can be an issue for future projects that involve repeat business: ‘many branches of the law, once reviewed, will

\(^{46}\) *Law Reform Now: A Programme for the Next Three Years* (n 45) 5.  
\(^{47}\) Clive, ‘Law Reform and Social Policy’ (n 39) 70.  
\(^{48}\) Eighth Programme of Law Reform (Law Com No 274, 2001).  
\(^{49}\) ‘modern’, ‘modernising’, ‘modernisation’ or ‘modernity’. ‘Outdated’ or ‘update(d)’ appear ten times.  
\(^{50}\) Annual Report 2021–22 (and sometimes twice in the same sentence, as at 21 and 45).  
have to be reviewed again’. 52 Thus the Commission may have to revisit its own previous work, especially when one looks back at six decades of achievements across so many areas of the law. But if the original project invoked the rhetoric of modernisation, that the Commission would bring the law up to date for the present times, it may cause government to query whether they got it right in the first place. There may be various reasons why such a re-evaluation is necessary. There may have been a considerable gap between the original report and its implementation, as occurred with the Mental Capacity Act 2005, where the Commission’s initial work began in 1989. 53 In its Twelfth Programme of Law Reform in 2014, the Commission proposed its Updating the Land Registration Act 2002 project, 54 revisiting the area after the ‘revolution’ 55 promised by the previous project which led to the Land Registration Act 2002. Those recommendations have since been largely accepted by the Government. 56 Even before reaching the report stage, projects may themselves become obsolete, and the Commission has had to decide whether to keep or give up projects from one programme of reform to another. 57

When seeking to ‘modernise’, there can also be a time-sensitivity to the problems being addressed by any reforms—for example, the Digital Assets project takes a facilitative approach within existing juridical concepts by proposing recognition of a new right in personal property. 58 And at a time of immense volatility in the values of cryptocurrencies and the markets for crypto-assets such as non-fungible tokens, the situation may change rapidly before a report concludes. There will be limits to what law reform agencies can propose with respect to specific areas—such as where certain concerns are better addressed through regulation.

54 Law Com 380, 2018.
57 See generally Lady Hale (n 7).
But in the absence of regulation being imminent (if forthcoming at all) some questions may need to be addressed in the interim. Legislation may therefore be designed as experimental, or even with a built-in obsolescence, pending a more systemic or systematic intervention.

A further aspect of ‘modernisation’, then, concerns whether the aim ought to be to bring the law up to date, or to design the law in the first place to hold good for future developments, insofar as it is possible to do so. An attempt at ‘future-proofing’ can be seen in the *Modernising Communications Offences* project. There, the Commission focused on ‘technological neutrality’, ‘to ensure that the law does not become redundant in the face of technological change’. In this context, ‘technological neutrality’ means that an offence should work for all kinds of media—the reform is designed to respond to the way in which modern means of communication occur across a range of media, but still to be compatible with the traditional postal service. There may be a perception on the part of government or legislators that law reform agencies are too slowly consultative and painstakingly deliberative to respond to the relevant challenges of fast-paced developments. But, as I show below, there are advantages to the position of law reform agencies in considering the future, not least through their methods of consultation.

### 3. The Context of Law Reform

2023 sees the 60th anniversary of *Law Reform Now*, a book which called for an overhaul of the ‘machinery of law reform’. The book’s editors, including Lord Gardiner who would oversee the creation of the Law Commissions, argued that the task of law reform was urgent:

> We think we are justified in treating as axiomatic the proposition that much of our English law is out of date, and some of it shockingly so. The fact that this view is shared by the overwhelming part of the legal profession is significant; for, taken as a whole, no profession could be more conservative.

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61. See L Bennett Moses and M Zalnieriute, ‘Law and Technology in the Dimension of Time’ in *Time, Law, and Change* (n 10).
64. *Law Reform Now* (n 63) 1.
This work, and the book, led ultimately to the creation of the Law Commission of England & Wales and the Scottish Law Commission through the Law Commissions Act 1965, a landmark in our history of law reform. There has been extensive scholarship on the early years of the Commissions, and so I offer only a brief summary of the background in order to give context for the arguments which I wish to make about the current position.

The 1965 Act was introduced under Harold Wilson’s Labour government, with Lord Gardiner as his Lord Chancellor. The Act was part ‘of what was claimed to be a coherent strategy of structural modernisation’. In leading the Bill through the House of Lords, on 1st April 1965, Lord Gardiner lamented that it ‘has never been anybody’s job in England, who could do it, to see that our law is in good working order and kept up to date’. In a sketched scene worthy of a satirical comedy, his Lordship recalled

at one time writing to the then Lord Chancellor pointing out an error which I thought I had found in a law. He wrote back and told me to write to the Home Secretary. I wrote to the Home Secretary, and he then wrote back and said that it was nothing to do with him but was a matter for the Lord Chancellor.

The Bill was intended to remedy this responsibility vacuum. Although the ultimate passage of the Bill commanded cross-party support, there was a contrast between the approach of Lord Gardiner and his immediate predecessor Viscount Dilhorne during the Parliamentary debates. Dilhorne’s views of the potential of a law reform agency were small-c conservative, as he defended the features of the existing system. Several serving Lords of Appeal in Ordinary also contributed to the debate. Lord Wilberforce, foreshadowing rhetoric to come, criticised the law for being out of date, and reflecting ‘the standards of the Victorian

Although I have referred to some historical efforts already, institutional law reform is of great heritage, whether the 1652 Commission led by Sir Matthew Hale (M Cotterell, ‘Interregnum Law Reform: The Hale Commission of 1652’ (October 1968) 83 The English Historical Review 689) or the 1853 proposal of Lord Cranworth to appoint five Law Commissioners (referred to by Lord Gardiner in the debates on the 1965 Bill, ‘a Law Commission is not some brilliant brain-child of mine’: HL Deb 1 April 1965, vol 264, col 1218).


HL Deb 1 April 1965, vol 264, col 1146.

HL Deb 1 April 1965, vol 264, col 1146.

HL Deb 1 April 1965, vol 264, col 1160ff.
period, of the nineteenth century, in such matters as family relations, in many economic matters, in many social matters’. Lord Reid, thought that, given ‘five or ten years of really useful work’ by the Commission, ‘lawyers’ law ought to be in pretty good shape’. Lord Denning, then Master of the Rolls, held out hope for an annual Law Reform Bill which could address gaps in the law identified by judges and solved by the Commission.

The 1965 Act created the Commissions as bodies of Commissioners ‘for the purposes of promoting the reform of the law’. Commissioners must be viewed by the relevant authorities as qualified by reason of experience as a judge, in legal practice, or as a teacher of law in a university. In addition, the Chair of the Law Commission must be a High Court or Court of Appeal judge. The Functions of the Commissions are set out in section 3. There is a general paragraph relating to the Commissions’ duties and then various specific functions. The general paragraph provides that

It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law...

It is immediately apparent that the duty to ‘keep under review all the law… with a view to its systematic reform’ involves a sizeable task. And we see that from the very creation of the Commissions the need for modernisation has been expressly part of the vision. In the wording of the section, codification, elimination of anomalies, repeal and consolidation are framed as being examples of the general imperative to simplify and to modernise.

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70 HL Deb 1 April 1965, vol 264, col 1173–74.
71 HL Deb 1 April 1965, vol 264, col 1201.
73 Law Commissions Act 1965, s 1 (England and Wales); s 2 (Scotland). Commissioners are appointed by the Lord Chancellor in the case of the Law Commission and the Scottish Ministers for the Scottish Law Commission.
74 Law Commissions Act 1965, s 1A, inserted by the Tribunals, Courts and Enforcement Act 2007, s 60 (although the Explanatory Notes to the 2007 Act, at para 317, record that the ‘change reflects what has happened in practice since the establishment of the Law Commission’).
75 Law Commissions Act 1965, s 3(1).
76 Law Commissions Act 1965, s 3(1)(a)–(f).
Mitchell has highlighted the confidence and diplomacy with which the Commission framed its early work\(^\text{77}\) as ‘a newly-created, unrepresentative, advisory body operating in a sphere already densely populated by well-established, organised, authoritative and articulate actors… in search of strategies that would lend its operations and proposals persuasive power’.\(^\text{78}\)

In its first programme, the Commissioners noted that ‘A great deal will have to be done before it can be justly said that our legal system is in harmony with the social and economic requirements and aspirations of a modern state’.\(^\text{79}\) The Commissioners also recognised that the mere fact that a law is long-standing does not make it ripe for reform\(^\text{80}\):

Much of English law is heavily overlaid with history. This does not mean that the principles involved may not still be applicable in modern conditions, subject to necessary adjustments from time to time. There are, however, certain parts of the law which seem to rest on social assumptions which are no longer valid or to involve archaic procedures.\(^\text{81}\)

The Law Commission’s functions and duties in keeping all the law under review are important because they are separate from the political priorities and exigencies of the day. Such importance can be shown by one item identified in the Ninth Programme of Law Reform from 2005.\(^\text{82}\) Public Health had been suggested as a topic. The Commission’s previous work in consolidating the law in the area in what became the Public Health (Control of Disease) Act 1984 had been praised by Lord Hailsham: ‘consolidation… makes the duties of the legal profession and those who have need to know the text of the law so very much easier than it would otherwise be’.\(^\text{83}\)

But in its Ninth Programme the Commission observed that ‘The fear remains… that the effectiveness of the British response to a major

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\(^\text{77}\) P Mitchell, ‘Strategies of the Early Law Commission’ in *Fifty Years of the Law Commissions* (n 4); see also OR McGregor, *Social History and Law Reform* (Hamlyn Lectures) (Stevens & Sons 1981).

\(^\text{78}\) ibid 45.

\(^\text{79}\) First Programme of the Law Commission S.O. Code No 39-86 (1965) Note by the Commissioners, para 5.

\(^\text{80}\) First Programme, p 13.

\(^\text{81}\) First Programme, p 13.

\(^\text{82}\) Law Com No 293 (2005).

outbreak of contagious disease could be significantly impaired by the defects in the law’. 84 The Commissioners continued:

Since Victorian times, the law has recognised the need for certain unusual compulsory powers to be available to the authorities to deal with the spread of contagious and infectious diseases. The law had been consolidated in the Public Health (Control of Disease) Act 1984, but many of the provisions of the Act are directly derived from Victorian antecedents. The existing law is, therefore, largely based on nineteenth century social conditions, and a nineteenth century understanding of the science behind the spread of diseases. 85

Reading those observations in 2023 has especial resonance, following the experience of the last three years of a global pandemic. In 2005, the Commission was sufficiently concerned that it invoked its (rarely used) 86 ability to recommend that a project should be carried out by Government, either directly or through another agency, even if not the Commission itself. 87 The Commission’s arguments did lead to some changes being introduced by the government in Part 3 of the Health and Social Care Act 2008, 88 although we may speculate whether a Law Commission-led project might have better informed later pandemic planning even further.

Examining rhetoric—the art of persuasion—requires us to consider whom the subject is persuading: the audience or audiences. In the case of the Law Commission, it has several audiences—obviously including ministers and members of Parliament or the Senedd Cymru—but also beyond Westminster and Cardiff, in the form of lawyers, industry, the academy and other stakeholders. Those audiences may take on different importance at different stages of a law reform project, and therefore, the way in which the Commission speaks about reforms can matter at different stages too. The Commission has, from the outset, been concerned with the relevance of its work by engaging with the professions and the wider public: as Lord Scarman put it, ‘keeping in touch with the social

84 Ninth Programme (n 82) para 4.10.
85 Ninth Programme (n 82) paras 4.3 and 4.4.
86 Ninth Programme (n 82) para 4.11.
87 As part of s 3(1)(b) of the 1965 Act. The Commission has in the majority of cases recommended itself as the relevant agency.
88 See Joint Committee on Human Rights, Legislative Scrutiny: Health and Social Care Bill, Eighth Report of Session 2007–08, Appendix 3: Letter dated 7 January 2008 from Ben Bradshaw, Minister of State for Health Services. The Explanatory Notes to Part 3 (paras 29 and 30) do not refer expressly to the Law Commission’s suggestion, but do repeat the themes.
realities around us… seeing where the shoe pinches, seeing what’s wrong and how it can be put right’. 89 Its creative ways of engagement, and its commitment to consultation have been praised since its early days. 90 The Law Commission reflects regularly upon how it can engage with the media and the wider public. 91 It now deploys ‘easy read’ and accessible summaries for specific reports, 92 and infographics, videos and podcasts across social media to support communication of its work. 93

When the Commission consults, and when it makes proposals, it can perform a range of roles, speaking to its different audiences. Its work may ultimately result in a substantive change in the law. Yet, while implementation and the fate of reports are important, we should recognise that the Commission’s work can also contribute in other valuable ways: ‘to open up to serious public analysis and discussion the implications of reform and the formidable difficulties of policy often involved’. 94 It can also, as for example with the joint consumer law projects with the Scottish Law Commission, 95 perform an educative role, informing people about their existing rights, as well as new ones. The Commission can therefore also inform understanding of the business and importance of law reform itself. 96 The voluminous reports of law reform Commissions have value as texts for legal history, 97 for students and academics as summaries of the law and sources of ideas. Having examined the history and context of the Law Commission’s work, I now turn to consider some examples of current legal problems with the rhetoric of law reform.

90 This has also been identified as a positive practice during periodic reviews of its work—eg Ministry of Justice, Triennial Review: Law Commission – Report of Stage Two (March 2014) para 46.
92 See, eg, ‘Families and surrogacy – tell us what you think about a new law’ produced alongside Law Com CP 244 Building families through surrogacy: a new law (2019), a joint project with the Scottish Law Commission. The Surrogacy project also involved a series of consultation events with different stakeholders.
95 For example, Law Com No 332 & Scot Law Com No 226, Consumer Redress for Misleading and Aggressive Practices (2012).
97 P Mitchell, ‘Strategies of the Early Law Commission’ in Fifty Years of the Law Commissions (n 4); Croucher (n 96) 535.
4. Trust the Process? Trust Law Reform

Included in the Commission’s 13th Programme of Law Reform was a scoping study project entitled ‘Modernising Trust law for a Global Britain’. The framing here illustrates some of the difficulties of modernising rhetoric. Trusts is characterised as an ‘outdated area of the law’, that ‘has not been comprehensively reviewed since 1925’.98 This date is a reference to the reforms culminating in the Law of Property Act 1925 and the Trustee Act 1925. The Commission continued that

In contrast, many other ‘onshore’ and ‘offshore’ jurisdictions – including Scotland, Jersey, New Zealand and Singapore – have updated their trust law and been creative in maintaining a healthy trust market.99

The law of trusts is, though, an area in which the Law Commission has had considerable success over the last thirty years with respect to the implementation of its proposals.100 Much of that success was premised on trusts being a technical, non-politically controversial area of law. The Perpetuities and Accumulations Act 2009, Trusts (Capital and Income) Act 2013 and the Inheritance and ‘Trustees’ Powers Act 2014 all emanate from Law Commission projects.101 Going further back, we can point to the Trusts of Land Report102 leading to the Trusts of Land and Appointment of Trustees Act 1996, and the Trustees’ Powers and Duties Report103 leading to the Trustee Act 2000.

New Zealand has indeed recently reformed its law of trusts via The Trusts Act 2019 (NZ).104 However, a number of the reforms enacted by the 2019 Act are those which the (English) Law Commission’s incremental projects have already addressed. The reforms were proposed by the New Zealand Law Commission across six issues papers and a final

100 A review of the law of trusts was first included in the Fourth Programme of Law Reform, with specific reference to powers of attorneys and trustees and the rule against perpetuities, and the possibility of other aspects being included too (Law Com No 185 (1989)). Aspects of the proposal were paused as a potential project in the Seventh Programme in (Law Com No 259 (1999) 41).
101 Respectively, the Acts result from Law Com 251, The Rules against Perpetuities and Excessive Accumulations (1998); Law Com 316, Capital and Income in Trusts: Classification and Apportionment (2009); and Law Com 331, Intestacy and Family Provision Claims on Death (2011).
102 Law Com No 181, 1989.
103 Law Com No 260, 1999.
Report\textsuperscript{105}: the Act aimed to be comprehensive in setting out positions on a number of issues, but it was not an attempt at codification of the law of trusts.\textsuperscript{106}

No doubt, there are further opportunities to improve the English law of trusts and consider whether innovations from other jurisdictions would be welcome additions (or whether not adopting such changes would offer a point of difference). The express invocation of off-shore practices, however, while understandable in the context of government priorities, may also make the project appear controversial. The exclusion of taxation of trusts\textsuperscript{107} from the project is also understandable on its face, but the favourable tax treatment afforded in off-shore jurisdictions is integrally linked to the value of the creative forms and elements of the trust (and ‘trust-like structures’)\textsuperscript{108} adopted in those other jurisdictions. What is more, any reform of trusts law can have implications for the revenue because of the potential consequences of changes in ownership structures and interests in respect of property.

I argue that the proposed Trusts project is evidence of how the rhetoric of law reform can be difficult further down the line.

First, the desire to show the imperative for a review and reform risks over-stating the extent to which the law is actually ‘out of date’.

Second, which is related, the selective account of history risks under-stating the Law Commission’s own attentiveness and success in one of the key areas in which its reforms have been implemented over the years.

Third, the framing of this project is closely aligned in presentation to the government of the then day’s priorities. The Commission in its news story on the 13th programme grouped its projects under two broad aims—to ‘boost Global Britain and help enhance the UK’s competitiveness as we leave the EU’ and to ‘improve the way in which the law works for the citizen or businesses’.\textsuperscript{109} This point matters not only for the perception and reality of the Commission’s independence from Government in the abstract; it also matters for the fate of the Law Commission’s projects.


\textsuperscript{106} \textit{Review of the Law of Trusts} (n 105) ch 3.

\textsuperscript{107} \textit{Thirteenth Programme}, para 2.25.

\textsuperscript{108} ibid, para 2.24.

of the Commission’s projects. Government priorities may change. Governments may change. Pitching a project in a way that speaks to a particular conception of ‘Global Britain’, for example, may make it less likely to appeal to the imagination of a governing party of a different political inclination. If a project which has been approved is thought to be advancing a particular policy agenda, then it may not command the support of a future government (whether from a different party, or a change in leadership of the same party), that the project might otherwise merit on its own terms.

Framing the project as being about ensuring or enhancing England and Wales’s global competitiveness as a law and as a dispute resolution centre is one thing. But the comparator jurisdictions include those which are off-shore, where political and popular attention has focused in more recent years. Adopting distinctive innovations from such jurisdictions may not command support from across the political spectrum. I am not arguing against the Commission examining the law of trusts, only suggesting that there are different ways of telling the story and selling the vision of law reform.

Sir Jack Beatson has noted that the Commission could mitigate some of this risk when deciding which projects to take on, by determining ‘whether the case for reform is based on durable or transitory factors’.\footnote{Sir Jack Beatson, ‘Challenges for Independent Law Reformers from Changing External Priorities and Shorter Timescales’ in \textit{Fifty Years of the Law Commissions} (n 4) 252–55.} My argument buttresses this observation by emphasising that the original presentation of the case for reform is crucial too: framing a project in a particular way at the outset has implications for its future development.

5. \textit{Victoriana}

A. \textit{Bygone Era?}

The pitch for the Trusts project above involved pointing to what was (said to be) a century-old law. A notable trend in the rhetoric of project choices goes back further. Since the Eleventh Programme of reform, the Commission’s programmes have placed increasing emphasis on laws being (or having been) ‘Victorian’, in areas as diverse as offences against

\footnote{Beatson (n 110) 255.}
the person, taxis, wildlife law and bills of sale. Sometimes this criticism is purely mentioned for rhetorical effect: the law goes back several generations, to the last but one century, and so reform is welcome. Sometimes further detail is given as to why the Victorian standing is relevant, such as the style of drafting a statute and structuring offences, as with the project to review the Offences Against the Person Act 1861:

[The Act] is widely recognised as being outdated. It uses archaic language and follows a Victorian approach of listing separate offences for individual factual scenarios, many of which are no longer necessary (see for example the section 17 offence of impeding a person endeavouring to save himself from a shipwreck).

As a consolidation statute, the 1861 Act brought together various offences but without much by way of amendment or coordination. It was said to have adopted a hierarchy that was not coherent. The Lord Chief Justice endorsed the project on behalf of the senior judiciary, calling the Act ‘out of date and in some areas obsolete [and thus] new ways of offending are not adequately captured’.

The Government has yet to make a decision on the proposed Offences reforms, having referred to the report in its 2017 and then 2018 reports on implementation of Law Commission proposals. No response has so far been issued. There has however been legislative activity referring to the existing provisions of the 1861 Act—the introduction by the Domestic Abuse Act 2021 of a new offence of strangulation

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112 Eleventh Programme of Law Reform (Law Com No 330, 2011) para 2.61.
113 Eleventh Programme, para 2.72: ‘Taxi-cabs (“hackney carriages”) are a highly regulated market, and have been since Victorian times (or earlier – some controls were first imposed under the Stuarts)’.
114 Eleventh Programme, para 2.83: ‘The current law regulating human dealings with wildlife is spread over many statutes going back to (at least) the early nineteenth century’.
115 Eleventh Programme, paras 3.40–3.44. Thirteenth Programme of Law Reform (n 98) para 3.11.
116 Eleventh Programme, para 2.61. The 2015 report can be found as No 361 Reform of Offences against the Person, Law Com No 361 (see also Law No 218, Legislating the Criminal Code Offences Against the Person and General Principles, para 2.1). The 1861 Act ‘uses concepts and language which were outdated even at the time it was passed’, Arden (n 22) 573; JC Smith (n 20) 17–18. For different views on the scheme of the Act, see J Gardner, ‘Rationality and the Rule of Law in Offences against the Person’ (1994) 53 Cambridge Law Journal 502 and P Glazebrook, ‘Should We Have a Law of Attempted Crime?’ (1969) 85 Law Quarterly Review 28.
117 Law Com No 361, para 1.13.
118 Law Com No 361, paras 1.7–1.10.
119 Law Com No 361, quoted in 1.16(1).
or suffocation\(^{121}\) cross-refers to sections 18, 20 and 47 of the 1861 Act. There was only passing reference to the Commission’s project during the passage of the 2021 Bill,\(^{122}\) but no Government comment.

And yet the 1861 Act contained offences that were excluded from the Law Commission's project, relating to bigamy, abortion and concealing birth\(^{123}\): these were omitted from the scope because they are 'of a fundamentally different character'\(^{124}\) and ‘raise issues going well beyond the law of offences against the person’.\(^{125}\) Any changes to the law on these crimes would also be politically controversial. So the proposed reform, even if implemented, would still leave such provisions unchanged, and parts of the Victorian legislation in place.

B. Wills

A fuller example of the Victorian framing is the Commission’s long-standing and ongoing project to review the law relating to Wills. A will is a legal instrument that can touch the lives and fortunes of many people: who inherits, and who does not inherit, our property when we die? The Law Commission argued that ‘the outdated law of wills needs an overhaul… [because] Victorian laws, out of step with the modern world, are failing to protect the vulnerable’.\(^{126}\) The basic statutory rule on formalities is found in section 9 of the Wills Act 1837, requiring that, for a will to be valid, it must be in writing, signed by the testator (or someone doing so on their behalf in the presence of the testator), and that the signature is made or acknowledged by the testator in the presence of two eligible witnesses who themselves attest and sign the will.

The 1837 Act was introduced to harmonise the position on testamentary dispositions of different kinds of property.\(^{127}\) Its story mirrors contemporary challenges of law reform. It finally passed, after

\(^{121}\) Section 70 of the Domestic Abuse Act 2021, inserting s 75A into the Serious Crime Act 2015.

\(^{122}\) Lord Marks of Henley-on-Thames referred to the views of Prof David Ormerod, HL Deb 3 February 2021, vol 809, cols 2258–59.

\(^{123}\) Offences Against the Person Act 1861, ss 57–60. An emergency debate was held on the role of the UK Parliament in repealing ss 58 and 59 in June 2018; HC Deb 5 June 2018, vol 642, cols 205–57; see also HC Deb 23 July 2019, vol 663, cols 1222–28.


\(^{125}\) Law Com CP No 217, para 2.231.


\(^{127}\) HC Deb 27 February 1837, vol 38, col 1665.
facing difficulties of securing sufficient Government attention and Parliamentary time, in 1837. Lord Langdale, the Master of the Rolls, introducing the Bill, said that he had consulted widely

being of opinion that in such a case no caution could be superfluous, and being certain that I might rely on receiving advice and assistance from the members of a learned and liberal profession, I caused several copies of the Bill to be sent to many eminent men engaged in different branches of the law, and from them I received, as I had expected to do, many valuable communications - some of them reached me at a late period of the Session—and that, together with other circumstances, prevented me from laying the subject in detail before your Lordships in the course of the last year.\(^{128}\)

The law does thus ‘date from the Victorian era’,\(^ {129}\)—indeed, having been passed on 3rd July 1837, it is one of the first pieces of legislation passed in the reign of Queen Victoria.\(^ {130}\) However, the provision has been amended and re-enacted several times over the intervening two centuries,\(^ {131}\) mostly recently by section 17 of the Administration of Justice Act 1982. Although the Commission recognises this in the consultation paper’s footnotes,\(^ {132}\) it states that the ‘new section is not fundamentally different in its requirements’.\(^ {133}\) That claim is broadly true, but the language and form was updated to be more modern. The original provision in section 9 was

And be it further enacted, That no Will shall be valid unless it shall be in Writing and executed in manner herein-after mentioned; (that is to say,) it shall be signed at the Foot or End thereof by the Testator, or by some other Person in his Presence and by his Direction; and such Signature shall be made or acknowledged by the Testator in the Presence of Two or more Witnesses present at the same Time; and such Witnesses shall attest and shall subscribe the Will in the Presence of the Testator, but no Form of Attestation shall be necessary.

Whereas the current version is:

No will shall be valid unless—

(a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and

128 HL Deb 23 February 1837, vol 36, col 964.
129 Twelfth Programme of Law Reform (Law Com No 354, 2014) para 2.31.
130 1 Vict. c 26; Queen Victoria ascended to the throne on 20th June.
131 See, eg, Marley v Rawlings [2014] UKSC 2 per Lord Neuberger at [14].
133 Making a Will (n 132), p 72, fn 2.
(b) it appears that the testator intended by his signature to give effect to the will; and
(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
(d) each witness either—
   (i) attests and signs the will; or
   (ii) acknowledges his signature,
in the presence of the testator (but not necessarily in the presence of any other witness),

but no form of attestation shall be necessary.

The current version is more structured, avoids dated language such as ‘herein-after’ and ‘thereof’, and no longer requires the testator to have signed at the foot of the will. Instead, the newer provision requires that the testator intended by his signature to give effect to the will. Lord Hailsham described it as ‘restating and simplifying the formal requirements for signing and attestation’. 134

The Commission’s project is of course wider than just the formalities with which a testator must comply:

The law in England and Wales that governs wills is, in large part, a product of the 19th century: the main statute is the Wills Act 1837, and the law that specifies when a person has the capacity to make a will was set out in a case from 1870.[ 135 ] The law of wills needs to be modernised to take account of the changes in society, technology and medical understanding that have taken place since the Victorian era. 136

Importantly, the Commission then went on to identify the relevant changes which, in its view, have occurred since then: including the ageing population, greater understanding of capacity, the emergence of digital technologies and changing patterns of family life. 137

The Commission’s consultation paper, while considering various aspects of the influence of technology on wills, mentions the specific issue of witnessing by videoconferencing relatively briefly, 138 concluding that ‘it is unlikely that the current law governing witnessing extends to witnessing via videoconferencing because “presence” has been held

135  Referring to Banks v Goodfellow (1869–70) LR 5 QB 549.
136  ibid, para 1.2.
137  ibid.
138  Making a Will (n 132) para 6.32 and paras 6.41–6.43.
to involve physical presence’. The authority cited for that is *In the goods of Chalcraft*, although that is a case in which the witnesses were physically in the room and dispute was over whether the deceased was ‘mentally present’ at the time of the signature, since she was slipping towards unconsciousness.

The consultation closed on November 2017. However, the Commission was asked by the government to pause the project in 2019, in order that work on reform of the law on weddings could be prioritised. But then, during the period of pandemic restrictions, some provision for remote witnessing became essential. Section 9 of the Wills Act 1837 was amended to include, for a fixed period of two years in relation to wills made on or after 31 January 2020 and on or before 31 January 2022, ‘presence’ [of a witness] includes presence by means of videoconference or other visual transmission.

The ability to have a will witnessed via video-link has been extended by a further two years until 31 January 2024. The Lord Chancellor’s announcement of that extension expressly referred to the Law Commission’s ongoing project. As it happens, the Commission’s initial view in the Consultation Paper was that the balance between regulation and flexibility with respect to emerging technology would be ‘best struck by conferring on the Lord Chancellor the power to make provision for electronic wills by statutory instrument’.

The Commission has now resumed its work on the Wills project, and will be able to consider evidence of how the emergency interim measures permitting remote witnessing have worked in practice (albeit

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139 *Making a Will* (n 132) para 6.32.
140 [1948] P 222.
141 Sir David Bean, the former Chair of the Commission, pointed to the fate of the Wills project in evidence to the Justice Select Committee, when he regretted ‘a tendency, which will accelerate, for the paid work to elbow aside the unpaid work’; cited by the Ministry of Justice, *Tailored Review of the Law Commission of England and Wales*, 7 February 2019, para.7.5.
143 Wills Act 1837 (Electronic Communications) (Amendment) (Coronavirus) Order 2020/952, art 2.
144 Wills Act 1837 (Electronic Communications) (Amendment) Order 2022/18, art 2.
145 ‘In the longer term the Government will be considering wider reforms to the law on making wills and responding to a forthcoming Law Commission report. The Law Commission were consulted in the development of the Government’s original response to this issue’. ‘Video-witnessed wills legalisation extended: Notes to editors’ <https://www.gov.uk/government/news/video-witnessed-wills-legalisation-extended>.
146 *Making a Will* (n 132) para 6.39.
147 <https://www.lawcom.gov.uk/project/wills/>.
that the need to consider such evidence may add further length to the significant time that has elapsed since the consultation closed five years ago). That is a form of piloting of ideas that is relatively rare for a law reform agency to have had access to, though it was not by design.

There are also intersections with Law Commission projects which may now develop in parallel, involving work by both the Commission and other bodies. The Government\textsuperscript{148} set up an expert industry working group to look at various points arising from the Commission's 2019 reported on the electronic execution of documents.\textsuperscript{149} That group published an interim report in February 2022.\textsuperscript{150} Although wills were excluded from the Law Commission documents project, the group recommended that the temporary provision for the remote witnessing of wills (which had, as noted, been extended in January 2022) should be made permanent.\textsuperscript{151}

But establishing the need for modernisation may not necessarily translate into a case for the urgency of reform. There may even be an ironic disinclination on the part of government to act swiftly on reform proposals, because of a vague sense that the long-standing law has not been to cause acute difficulties. While there are eternal questions that one may wish to tackle, explaining the significance of the problem and proposed solution can be hard in the abstract, as opposed to where interest can be galvanised by a recent controversy. On Wills, the Commission was unquestionably right to highlight the need for the impact of technology to be considered, but there was not, in 2019, sufficient impetus attached to the issue in government. There is also a risk of cherry picking, in that government may select only the most eye-catching of reforms, or those which at any moment seem to be most attractive—dining a la carte rather than from the set-menu.

Shona Wilson Stark has argued persuasively that we should not fixate on an expectation of immediate implementation of Law Commission reports,\textsuperscript{152} instead examining the period post-Report for any given project and the longer-term contribution of Law Commission outputs.

\textsuperscript{148} HC Deb 3 March 2020, vol 672, col 31WS.
\textsuperscript{149} Law Com No 386, 2019.
\textsuperscript{151} Industry Working Group (n 153) para xiii.g.
\textsuperscript{152} S Wilson Stark, ‘Promoting Law Reform: By Means of Draft Bills or Otherwise’ in Fifty Years of the Law Commissions (n 4).
There is also scope for post-legislative scrutiny to evaluate reforms\(^\text{153}\): although the history of the wills legislation offers one example of how not to undertake such scrutiny. In December 1837, a mere six months after the enactment of the Wills Act, Sir Edward Sugden (later Lord St Leonards), a barrister and scholar of trusts and estates, sought to bring a bill to suspend the Act for three months. This suspension would be in order that the government could consider submissions he personally wished to make about it, having only been returned to Parliament by election after it had passed: ‘he was ready to give every assistance in his power to make that Act perfect’.\(^\text{154}\) The Attorney General (John, later Lord, Campbell) did not take kindly to the suggestion, listing the many Commissioners and judges who had given their approval, as well as the Legislature, and asked:

> Was the right hon. and learned Gentleman, therefore, because he was not at the time a Member of the Legislature, now to come forward and ask the House, after all its labours, to stultify itself, and to declare that an Act upon which so much pains had been exhausted should not be allowed to come into operation?... Let not the House suppose that because his right hon. Friend was a great lawyer, that he was the only great lawyer of which this country could boast.\(^\text{155}\)

When it comes to law reform, some things never change, even if legislation does.

### 6. Relationship Breakdown?

> How can I try to explain?
> When I do he turns away again
> It's always been the same, same old story
> From the moment I could talk
> I was ordered to listen.\(^\text{156}\)

Having examined various aspects of our law reform processes, and the problem of rhetoric, I now turn to highlight some institutional issues and make constructive suggestions for reform. The institutional dimension


\(^{154}\) HC Deb 4 December 1837, vol 39, col 522.

\(^{155}\) HC Deb 4 December 1837, vol 39, col 537.

\(^{156}\) ‘Father and Son’ (n 1).
to the rhetoric is particularly significant because, as we have seen, the
Commission now often frames in its independently proposed projects
in a way that tries to speak to governmental priorities. If even then there
remain problems, we must look for further solutions. For, as leading
law and technology scholar Lyria Bennett Moses has argued, ‘Lament at
the law’s inability to keep pace with technological change needs to take
account of the institutional capacity we already have for addressing the
problem’.\(^{157}\) In this section, I identify problems with the institutional
relationships between Government, Ministers, Parliament and the Law
Commission the relationships are breaking down.\(^{158}\) I shall demonstrate
that there are currently key vulnerabilities which are undermining the
place of the Commission in our system of law reform.

A. The Lord Chancellor and Reporting

(i) The Scene
Following longstanding concerns around the implementation of reports,
the Law Commission Act 2009 was enacted. The 2009 Act provided for
a protocol setting out how the Commission and Government depart-
ments should work together throughout the period of a project (before,
during and afterwards). That Protocol was agreed in 2010.\(^{159}\)

The 2009 Act also imposed a statutory obligation on the Lord
Chancellor to lay before Parliament a report each year\(^{160}\) detailing the
extent of implementation of Law Commission proposals. This obligation
was introduced to increase accountability and Parliamentary oversight over
government responses to the work of the law reform body, in exchange for
the Commission collaborating with departments and requiring approval
before proceeding with a project. This change involved a potential reduc-
tion in independence at the project selection stage, in return for greater
engagement and implementation with projects throughout their develop-
ment. Annual ministerial reporting could also aid with transparency in
respect of the contribution and work of the Law Commission.

\(^{157}\) L Bennett Moses, ‘Agents of Change: How the Law “Copes” with Technological

\(^{158}\) With apologies to the title of Law Com No 307, Cohabitation: The Financial
Consequences of Relationship Breakdown (2007).

\(^{159}\) Law Commission and Ministry of Justice, LC 321, Protocol between the Lord
Chancellor (on behalf of the Government) and the Law Commission (2010).

\(^{160}\) Section 1 of the 2009 Act inserts s 3A into the Law Commissions Act 1965, which
now provides in s 3A(1) ‘As soon as practicable after the end of each reporting year, the
Lord Chancellor must prepare a report’. The duty only applies to the Law Commission
of England and Wales. On Welsh devolved matters, see text after n 168.
The last annual implementation report from a Lord Chancellor was published in July 2018. Prior to that, the reporting was erratic, with reports appearing in various months after the reporting period each January, and there being no report published for the year of January 2016 to 2017. The obligation is to prepare the report as soon as practicable after the end of each reporting year. It is extraordinary and unacceptable that there has been no compliance with this annual duty for five years, a period including five changes of Lord Chancellor, none of whom has met their obligation. Asking ministers to comply with statutory obligations is a minimum expectation. Lady Hale has said that ‘it is not always desirable to press government too hard for an answer. They may get round to it in the end. Better late than never’. Currently, ‘never’ is more likely.

Such implementation reports as we do have provide an account of the engagement of government with the work of the Commission—it is important to reiterate that under the 2009 Act/2010 Protocol framework, the Commission is only pursuing projects which have been endorsed in principle by a department. But reading through all those implementation reports suggests that change is necessary as to the content as well as their regularity. The format is to list each outstanding report in turn, with a summary of the aims of the project, often reproduced more or less verbatim from the Commission’s work, but without meaningful analysis. There is also noticeable procrastination from report to report.

The Lord Chancellor’s obligation does not extend to proposals relating to Welsh devolved matters. The Wales Act 2014, section 25 instead imposed, through the addition of section 3B to the 1965 Act, the reporting obligation for such matters on the Welsh Ministers, who must

161 Ministry of Justice, Report on the implementation of Law Commission recommendations (July 2018) Cm 9652.
162 The 2011, 2013 and 2017 reports were published in January of those years, the 2012 and 2015 reports in March, and the 2014 report in May.
163 2018 Report (n 164) 3.
164 Lady Hale (n 7) 21–22. Similarly, see Lord Toulson’s quotation from Ecclesiastes in ‘Democracy, Law Reform and the Rule of Law’ in Fifty Years of the Law Commissions (n 4) 138: ‘Cast thy bread upon the waters for thou shalt find it after many days’.
165 For example, on Termination of Tenancies for Tenant Default in Ministry of Justice, Report on the Implementation of Law Commission Proposals, Cm 9652 (July 2018) para 84: ‘Unfortunately, due to work on other government priorities, consideration of the proposals has not been able to progress over the last year. Work will resume as soon as is practicable, so that a decision can be made in due course’. Thirteen years after original publication, the Government asked the Commission to update its report: ‘Leasehold and Commonhold Reform’ HC Deb 31 October 2019, vol 667, col 33WS.
report to the Senedd. The obligation is almost identical to that on the Lord Chancellor, except that the section states simply that the Welsh Ministers ‘must prepare a report each year’ (omitting ‘as soon as practicable’). The Welsh Ministers have met this obligation annually since the first report in February 2016. In those seven reports, there is a solitary instance of a decision not to implement, which relates to proposals relating to Wildlife law in 2017, and even then some recommendations have since been taken forward in the Agriculture (Wales) Bill. While recognising that there is necessarily a smaller sample size of Commission projects relating to Welsh devolved matters, nonetheless the reporting mechanism is working in that jurisdiction. The Counsel General for Wales, in announcing the most recent report, noted that ‘this update and the progress noted demonstrates the importance the Welsh Government places on Law Commission proposals’. The absence of such updates for England mean that the Government is not demonstrating that it places importance on Commission proposals.

(ii) Sharing the Load

One constructive suggestion is to have a dedicated minister with relevant investment in the work of the Commission (rather than only oversight). The Ministry of Justice currently has five ministers—the Lord Chancellor, two Ministers of State and two Parliamentary Under Secretaries of State. The Ministry’s website lists the specific responsibilities of each of these Ministers—none is specifically listed as having responsibility for liaison with the Law Commission. There have

168 Brougham spoke of the position in Wales (n 30) at cols 146–47; see also Lloyd Jones (n 40) 359–61.
170 Lord Beecham, HL Deb 12 May 2014, vol 753, col 446. Sir Terence Etherton spoke in 2007 of the lack of administrative attention given to the Commission within the then Department for Constitutional Affairs being ‘a reflection of its low priority within a Department dealing with a wide range of highly politically charged and resource intensive functions’: Mr Justice Etherton, ‘Law Reform in England and Wales: A Shattered Dream or Triumph of Political Vision?’ (2008) 73 Amicus Curiae 3, 6. I am grateful to one of the referees for this reference.
171 Rt Hon Edward Argar MP and Rt Hon Damian Hinds MP.
172 Mike Freer MP and Lord Bellamy KC.
173 Oversight is provided through the governance structure of the Ministry of Justice, with reports from the Law Commission going to various committees of civil servants, see Ministry of Justice Annual Report and Accounts 2021 to 2022.
been previous occasions when specific responsibility for liaison with the Commission was allocated to a specific minister—the last such occasion was in 2015–16 when the Parliamentary Under Secretary of State, Minister for Human Rights, was Rt Hon Dominic Raab MP, who was Lord Chancellor until April 2023, when he was replaced by Rt Hon Alex Chalk MP.

Of course, we have seen above that the Lord Chancellor has statutory duties relating to the Law Commission and it may well be a good thing for that to be expressly recognised on the Ministry’s site too. But in *Law Reform Now*, the authors recognised that, although the Lord Chancellor ought to retain overall responsibility for law reform as head of the envisaged ‘Ministry of Justice’, the demands on the Lord Chancellor’s time were great. That remains true today, even though the Lord Chancellor no longer has judicial duties. The original suggestion of Gardiner and Martin was that the head of what was to become the Law Commission should be a ‘Vice-Chancellor’ who ‘should carry the rank of a Minister of State’. That model was not adopted, for good reasons, including the independence of the Commission, but having someone of ministerial standing designated to liaise with the Commission would still be useful. This suggestion is about more than a list of bullet points on the website: it is a visible sign of the Commission being valued, and would support the Lord Chancellor in their obligations in respect of the Commission.

In a 1969 review of one of Lord Scarman’s several series of lectures on law reform, Lord Chorley QC endorsed Scarman’s support for a Minister (and Ministry) of Justice: ‘such a Ministry should be able to work with and to reinforce the Commission’. Chorley particularly contemplated the future after Lord Gardiner’s tenure:

Lords Chancellor come and go. Not all of them by any means share the present incumbent’s enthusiasm for law reform: after he has gone it may well be that there will be a slackening off which a Department of State committed to the job could prevent from degenerating into a return to apathy.

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175 *Law Reform Now* (n 63) 7–8.
176 *Law Reform Now* (n 63) 8.
178 Chorley (n 180) 342.
As I have argued, there are risks for the Commission’s independence in the present arrangements if the challenges are not navigated with ongoing skill and attention.

This concern is not a party-political point. Respect for the contribution which existing institutions can make is, and ought to be, a core tenet of our politics, rather than being a tribal issue. The three longest-serving Lord Chancellors of the twentieth century were all Conservatives: Viscount Kilmuir, Lord Hailsham of St Marylebone and Lord Mackay of Clashfern. Each was, in their own way, engaged with and by the topic of law reform. Even before the creation of the Law Commission, Kilmuir observed that ‘in normal times a Lord Chancellor should urge upon his colleagues that law reform ought to have a regular place in the Government’s legislative programme’. A similar undertaking can be found in the latest Memorandum between the Commission and Lord Chancellor. Speaking at a thirtieth anniversary event of the Commission, Lord Mackay said his ‘normal assumption as Lord Chancellor was that one would want to give effect to Law Commission proposals’.

We have come a long way since Lord Hailsham was able to speculate that Law Commission Bills within the remit of the Lord Chancellor’s department had ‘fared markedly better’ than those sponsored elsewhere. In his own lecture in this series (entitled ‘Obstacles to Law Reform’), Lord Hailsham could point to projects on ‘limitation, consolidation, statute law revision and rules of court’, all in the first parliamentary session of his second term in office. Lord Hailsham went on to quote his predecessor Lord Haldane for the saying that it takes ‘three

179 Lord Halsbury served for ten years from 1895 to 1905.
180 Kilmuir (n 42) 82.
183 Lord Hailsham of St. Marylebone, ‘Obstacles to Law Reform’ (1981) 34 Current Legal Problems 279, 287. After his tenure, Lord Hailsham continued to take an interest in the Law Commission’s reform proposals. See, for example, his pressing of the (Conservative) minister on the Criminal Code report (Law Com No 177) in HL Deb 22 May 1989, vol 508, col 8. ‘[Does] my noble friend recognise that it is probably the most ambitious and comprehensive set of suggestions on law reform to which the Law Commission has yet given birth?’. Note also Hale ‘Fifty Years of the Law Commissions’ (n 7) 21.
184 Hailsham (n 186) 290.
successive Lord Chancellors to bring about a reform in the law'. There were three successive Lord Chancellors between 1st September and 30th October 2022, albeit that two of them were the same person.

When in Opposition, New Labour was vigorous in promoting reform. In 1996, the Society of Labour Lawyers published a further sequel to *Law Reform Now: Law Reform for All*. Lord Irvine of Lairg, then Shadow Lord Chancellor but a year later Lord Chancellor in government, wrote a chapter, identifying concerns around implementation, and arguing that it was

only possible to keep increasingly complex and far-reaching law efficient, fair and up-to-date by making full and effective use of the Law Commissions\(^\text{188}\) \ldots The importance and momentum of law reform must be restored by enhancing the status of the Commissions and putting in place arrangements for the implementation of the Commissions’ proposals. What is required is not merely *talk* about law reform, but the *action* that has been lacking in recent years.\(^\text{189}\)

Lord Irvine recommended an obligation on government to respond within six months to a report.\(^\text{190}\)

However, once in government, priorities may change. As Lady Arden has noted, 1995 had in fact been a ‘record year’ for the Law Commission, with ‘ten reports \ldots dusted down and implemented in whole or part [but] in the 1997/8 session of [the new, Labour-majority] Parliament, no Law Commission Bills were implemented’.\(^\text{191}\)

The 2009 Act came into force on 12 January 2010, and the subsequent Protocol was agreed in the March of the same year, in what turned out to be the final months of the last Labour government. The Perpetuities and Accumulations Act 2009 was the first piece of legislation to be passed via a new trial procedure in the House of Lords for the passage

\(^{185}\) Hailsham (n 186) 281–82.


\(^{187}\) Lord Irvine of Lairg QC, ‘The Legal System and Law Reform under Labour’ in Bean (n 189); compare the subsequent Labour Government’s *Modernising Justice* (Cm. 4155) (London 1998).

\(^{188}\) Irvine (n 190) 27.

\(^{189}\) Irvine (n 190) 28 (original emphasis).

\(^{190}\) There was an agreement between relevant departments and the Commission that departments would normally respond with six months (but it was not a legal obligation): 32nd Annual Report 1998, paras 1.11–1.12.

\(^{191}\) Arden (n 22) 566.
of non-controversial Law Commission bills. Those arrangements were thought necessary to address problems with government response to and implementation of Law Commission bills, during the prior decade.

The Commission currently maintains a helpful ‘Implementation Table’ on its website, showing its view of the fate of its reports so far.\(^{192}\)

At the time of writing, 160 are implemented in whole or in part; 34 are pending in whole or in part; Eleven were ‘Superseded’ (in ten cases by subsequent work from the Commission; in one instance\(^ {193}\) by a subsequent decision of the House of Lords).\(^ {194}\) 34 are accepted in whole or in part; Six reports have the Status ‘Accepted but will not be implemented’. Only one project, in Partnership Law,\(^ {195}\) has the hat-trick of being ‘Implemented in part; Accepted in part; Rejected in part’, although that outcome is at least the result of a reasoned consideration by the government. This Table is a worthwhile offering, but the legislative framework imposes a duty on the Lord Chancellor, not the Law Commission, to monitor and account for the implementation of Commission reports.

(iii) Scrutiny?

It is necessary to be clear about my critique here, which is about transparency and accountability, and the relationship between institutions. No Government can be expected to implement every report produced by the Commission, and

it is… wrong to assume that an unimplemented report is unjustifiably stilled, for there is often a substantial “political” element concealed in many apparently technical areas of law reform.\(^ {196}\)

But there can be an expectation of engagement and an explanation as to why a report’s recommendations are being rejected or otherwise not taken forward. And those reasons can be scrutinised to see whether they stand up.\(^ {197}\) Without an annual (or indeed, five-yearly) report to

\(^{192}\) Implementation Table <https://www.lawcom.gov.uk/our-work/implementation/table/>. See also Annual Report 2021–22, 42–43 (figures there are up to 31 May 2022).

\(^{193}\) Property Law: The Implications of Williams and Glyn’s Bank Ltd v Boland, Law Com No 115 (The Table (n 195) lists this as No 114, but that is an error).


\(^{195}\) Law Com 283 (2003).

\(^{196}\) Cretney, ‘The Politics of Law Reform’ (n 66) 500.

\(^{197}\) Hale, ‘Family Law Reform: Whither or Wither?’ (n 21) 231: ‘it is decidedly not an acceptable excuse that it is “too small to be worth doing”; or that lawyers find “no great difficulty in practice”’. See similarly (though talking about expert committees) Goode (n 5) 250: Proposed legislation is not to be dismissed out of hand simply because it is complex, time-consuming or lacking in popular appeal. Law is too important to be treated thus’. See also Kilmuir (n 42) 81.
Parliament as required by the Act, one route for Parliamentary scrutiny of Government engagement with the outputs of the Commission is lost. There are numerous examples in written questions of MPs from all parties asking ministers about the government’s response to specific projects. In reply to challenging questions on other issues, the government may even point to future Law Commission projects. On fewer occasions have MPs asked about the Lord Chancellor’s statutory obligation and the wider relationship with the Commission: but there are some written questions. In October 2022, Sir Peter Bottomley MP (Conservative) asked about the failure to comply with the reporting requirement, and was told that the report would be published ‘as soon as practicable’. The 2021–22 Annual Report of the Commission noted that the next report was ‘being drafted at the time of writing’. It had still not proven practicable to publish it by January 2023, when Matt Western MP (Labour) tabled several questions to the Lord Chancellor, including about the absence of reports for five years. Mike Freer MP, a Minister, replied:

A draft of the Government’s report on the implementation of Law Commission recommendations is currently being prepared and is expected to be laid before Parliament as soon as practicable this year. It will provide an update on the implementation status of all relevant Law Commission recommendations since the report was last published in 2018.

The Government has thus given itself up to a further year to produce its significantly overdue report. As helpful as individual written questions can be, Lord Irvine had suggested a joint committee of both Houses of

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198 For such questions and answers since 2009, covering reform projects including marriages, leasehold, surrogacy, hate crime, wills and driverless vehicles <https://questions-statements.parliament.uk/written-questions?Answered=Any&AnsweredFrom=&AnsweredTo=&DateFrom=01%2F01%2F2009&DateTo=21%2F02%2F2023&Expanded=True&House=Commons&SearchTerm=%22law%20commission%22>.

199 For example, Response by Tom Pursglove MP to UIN 76571 on the issue of reusing graves. The Commission’s project on ‘A Modern Framework for Disposing of the Dead’ began in December 2022, five years after being included in the 13th Programme of Law Reform.

200 UIN 72907, tabled on 27 October 2022.


202 See also UIN 22421, tabled by Stella Creasy MP on 21 June 2022; answered on 27 June 2022.

203 UIN 124052, tabled on 16 January 2023, answered on 18 January 2023 (emphasis added).
Parliament to oversee government action on law reform.\textsuperscript{204} Similarly, over the years the idea of a specific Select Committee has been mooted.\textsuperscript{205} Although the Commission engages with All Party Groups on specific issues,\textsuperscript{206} there is at present no All Party Group on Law Reform, which had been suggested by Lord Hailsham\textsuperscript{207} and might at least enhance the prominence of law reform.

(iv) Successes?

One might counter that we ought not to place too much weight on waiting for procedures to be followed in terms of annual reporting by the Lord Chancellor, or Parliamentary scrutiny of those reports (or their limitations). Substantive focus on reform matters too. There are also other ways in which there is governmental accountability, most obviously decisions and action on individual reports. These are sometimes published as responses, sometimes taken forward for further consultation and sometimes in the form of Written Statements.

Certain projects have, since the last implementation report in 2018, been taken up. In late 2022, the government announced its interim response to the Commission’s report on \textit{Intimate Image Abuse},\textsuperscript{208} with an intention to legislate generally when Parliamentary time allows, but to include certain specific measures in the Online Safety Bill currently before Parliament.\textsuperscript{209} That bill already included acceptance of particular recommended offences\textsuperscript{210} from the separate \textit{Modernising Communications Offences} report.\textsuperscript{211}

In terms of primary and secondary legislation, there has been \textit{Simplification of the Immigration Rules}\textsuperscript{212} and the new Sentencing Code.\textsuperscript{213} Yet still more urgency is needed—even when project recommendations are accepted, the speed of implementation can be slow. When the Law Commission’s Sentencing (Pre-consolidation Amendments) Act 2020 and the Sentencing Act 2000.
Bill (paving the way for the Sentencing Code) was introduced in the House of Lords, Lord Judge observed that

this process has been moving at a speed that would attract the unrestrained admiration of an indolent sloth—and an indolent sloth has no interest in the administration of justice in England and Wales.214

Then there have been, as noted, projects where the conclusions did not require legislation as a result, such as the electronic execution of documents, mentioned above. The project on smart contracts,215 which was requested by the Lord Chancellor as part of the Thirteenth Programme of Reform, has similarly concluded that the current legal framework is able to evolve accommodate the issues.216 However, we find here another complication of the rhetoric of law reform—the more a project is framed as being about modernisation pursuing particular policy goals, the harder it may be for the judiciary to take up recommendations and develop the law incrementally. Equally, given the impossibility of pre-judging the conclusions of a consultation process, expectations need to be managed for the government audience—it may be difficult to maintain enthusiasm for an area, or future reforms, if the conclusion is that the law is capable of organic development.

It is beneficial for the development of the law for there to be meaningful engagement by the government with its expert law reform agency’s output. And the supposedly closer working relationship between the Commission and Government at the outset of projects makes it all the more surprising that there should be an apparent reluctance by ministers to explain their reaction to projects that were approved in the first place. All projects since the 11th Programme reform have been approved by a Conservative-majority Coalition or Conservative government. The Government and Lord Chancellor should take confidence from their (or their party predecessors’) own original judgement in endorsing projects as part of each programme of reform, or out of cycle commissioning of new projects.217 Decisions on individual projects are important, but we also need regular systematic review of the law reform logbook and there should be serious periodic reflection to go with it. If producing

214 HL Deb 11 February 2020, vol 801, col 2237.
215 Law Com 401.
217 Six such references are covered in the Annual Report 2021–22, 70.
an annual report is proving too great a burden, alternatives could be considered. The Commission and Government could work together on the existing Implementation Table, treating it as a Dashboard, where all parties, and the public, could see progress, or its absence, as and when decisions are taken.

B. Statute Law Revision and Repeals

As we saw at the outset, the Commission’s statutory duty includes reviewing all the law by considering, amongst other things, ‘the repeal of obsolete and unnecessary enactments’ and proposing ‘comprehensive consolidation and statute law revision’.218 Lord Scarman called the start of this work ‘the beginning of a continuous assault…upon the form of the statute book’.220 In 2010, the Commission published a review of its statute law revision work over its first 45 years: that review extolled the virtues of having what was an experienced and expert team devoted to the work, since ‘Law reform of the statute book was never going to be the priority of any Department’.223

Statute law revision work is a distinct way of keeping the law up to date, by removing obsolete provisions, but without intending to make systematic changes in the law. However, Statute Law Repeals work has fallen into desuetude. The 20th Statute Law Repeals report remains unimplemented, the only one to do so. The turning point seems to have been 2016–17, where the Commission noted that

In future, our statute law repeals work is likely to narrow its focus... Priority candidates for repeal will be dead law that creates a risk of misleading the broadest range of those who rely on the statute book, whether that is in a professional or private capacity.225

218 Law Commissions Act 1965, s 3(1).
219 Law Commissions Act 1965, s 3(1)(d).
220 Scarman, ‘Lawyers and Law Reform’ (n 22) 6; Lord Toulson, ‘Democracy, Law Reform and the Rule of Law’ in Fifty Years of the Law Commissions (n 4) 133.
222 Statute Law Repeals: Review (n 224) 2.
223 Statute Law Repeals: Review (n 224) 2.
224 The last Statute Law (Repeals) Act was passed in 2013.
The 2016–17 report was also the last to refer to the repeals work being ‘carried out by a dedicated team’, and there is currently no separate Statute Law Repeals team listed on the Commission’s Organisation Chart. Since then, the lack of government engagement on the issue has led to repetition of near-identical paragraphs in the relevant section of the Annual Reports.

This significant change, both as to structure and remit, is confirmed by the latest 2021–22 Annual Report, published in December 2022. The relevant section begins, strikingly, ‘In the past, the Law Commission has identified candidates for repeal by research and consultation’.

In recent times, enthusiasm in Government for repeals work has reduced, which in turn makes it difficult for the Commission to allocate resource to this aspect of our work. Nevertheless, we remain committed to repeals work and will continue to consider ways in which we can focus our attention on those areas of law which have the potential to cause genuine confusion.

Similarly, on consolidation, the Report notes that ‘in a time of reduced funding in most areas of public services, consolidation is perhaps seen by the Government to be a lower priority’. The Commission also instead offered further suggestions for ways in which these areas of work may be carried out: it bears repeating that these activities are part of the Commission’s statutory obligations, yet it is at present simply not being supported to perform them.

C. Chairman

Further evidence of the Government dragging its feet can be seen in the process for recruiting the Chair of the Law Commission. The current Chair, Sir Nicholas Green, was appointed on 1 August 2018 for a three-year term. That was extended, as is possible, by one year in

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229 2021–22 Annual Report, 72 (emphasis added).
231 For example, 2020–21 Annual Report, 70–71.
232 Sir Terence Etherton, ‘Memoir of a Reforming Chairman’ in Fifty Years of the Law Commissions (n 4) 85.
March 2021, for Sir Nicholas to serve until 31 July 2022.\textsuperscript{234} But the process to recruit his successor was only advertised on 11 July 2022, with a closing date of 31 August.\textsuperscript{235} On 12 July, it was announced that Sir Nicholas’ term had been extended again, this time ‘until a date three months from the announcement of his successor’.\textsuperscript{236} No other Chair of the Commission has served for more than four years since its first two Chairs, Sir Leslie Scarman and Sir Samuel Cooke, and all four of Sir Nicholas’ immediate predecessors served three-year terms. The date of expiry of the term is known at the point of appointment (or point of extension, in this case 16 months before): the apparent lack of planning for recruitment does not suggest that Government has had the process as a priority. No Chair had been announced at the time of submission of the final version of this article, nine months after the relevant closing date (May 2023). The lack of alacrity in overseeing the leadership of the Commission appears therefore to be a further instance of relationship breakdown.

D. Programmes of Law Reform

We saw in the Introduction that the latest phase of the Law Commission’s work is its consultation on its Fourteenth Programme of Law Reform. This consultation took place in 2021, with nearly 200 possibilities being suggested for law reform, but the timetable for the Programme’s finalisation was, unusually, extended in April 2022,\textsuperscript{237} to enable the Commission to ‘continue our discussions with Departments in Whitehall’.\textsuperscript{238} Later, in its Annual Report for 2021–22, the Chairman noted that ‘it has become apparent to us that the process of finalising the programme will take longer than we initially forecast’.\textsuperscript{239} An update was issued in February 2023, when the Commission announced an indefinite extension:

> We have taken this decision in view of the Government’s focus on priorities for the remainder of this Parliament. The Commission is also fully engaged working on current projects.

\textsuperscript{234} \texttt{https://www.lawcom.gov.uk/extension-to-the-chairs-tenure-at-the-law-commission-announced/}.

\textsuperscript{235} \texttt{https://apply-for-public-appointment.service.gov.uk/roles/2919}.

\textsuperscript{236} \texttt{https://www.lawcom.gov.uk/extension-to-the-tenure-of-the-chair-of-the-law-commission/}.

\textsuperscript{237} Sir Nicholas Green, ‘Update on the 14th Programme of Law Reform’ \texttt{https://www.lawcom.gov.uk/update-on-the-14th-programme-of-law-reform/}.

\textsuperscript{238} Green (n 240).

\textsuperscript{239} Annual Report 2021–22, 2.
We do not consider that now is the right time to establish a new long-term programme of work which would cover the next five years and beyond. However, it remains our full intention to agree a new programme and in due course, and we will move forward again with Government to agree one.240

There may be many causes of the need to extend the period of finalisation indefinitely until beyond the current Parliament, and work on other projects will continue in the meantime. But the timeline for the next election mean that it would likely be 2025 before the next programme could be finalised. The Commission has only once gone for such a prolonged period without agreeing a new programme, between 1973 and 1989. Since 1989, it has been possible to agree with governments of different parties and coalitions a programme of reform on a regular basis, of typically once every three years. Set aside alongside the other issues highlighted, it is further spanner in the machinery of law reform.

E. Reforming the Reformers?

The problems are not solely mechanical but attitudinal. This view is strengthened when the recent history of periodic reviews of the Commission is considered. The Quinquennial review of the Law Commission in 2003 noted the need for ‘new procedural devices to facilitate Parliamentary scrutiny of Law Commission Bills to be invigorated’.241 The Commission was on the list when the so-called ‘bonfire of the quangos’ (quasi-non-governmental organisations) highlighted bodies considered for abolition, merger or retention in the Coalition Government’s Public Bodies Review in 2010 and 2011.242 The conclusion was that the Commission should be retained ‘on grounds of performing a technical function which should remain independent of Government’.243 Since then, the Commission has been through

243 ibid.
a Triennial Review in 2014, which found ‘extremely strong support for the functions of the Law Commission to continue’ and a Tailored Review in 2019, where the Commission’s existence was described as “essential”, “imperative” and “vital”. Thus, the wide consultative processes for institutional review of the Commission itself have at each turn endorsed the Commission’s essential functions and structure. In addition, the Commission commissioned a report by independent economists to estimate the ‘Value of Law Reform’, highlighting ways in which the Commission’s work makes a contribution, and one of the report’s conclusions was that ‘Government support is critical to the effective realisation of the potential benefits of law reform projects’.

Following the Tailored Review, which raised concerns about the Commission’s funding model compromising its independence, a new Memorandum of Understanding was agreed. The Commission would no longer rely on income generation from other departments, but will receive its entire operating budget from the Ministry of Justice directly. That agreement provides certainty and strengthens the Commission’s position, especially the recognition of a sufficient budget for the full utilisation of all five Commissioners, and the key principles of independence that follow from the 1965 Act framework. The current Chair has said it will enable the Commission ‘to focus upon carrying out law reform rather than chasing funding’.

Neither the Tailored Review, nor the resulting Memorandum between the Commission and the Lord Chancellor, referred to the latter’s obligation to report on implementation. Given the current unpredictable

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245 *Triennial Review: Stage One* (n 247) para 115.


247 2019 Tailored Review (n 249) para 5.6.


249 *Value of Law Reform* (n 251) 121, Conclusion 7.

250 There was a debate in the House of Lords on the matter: HL Deb 10 July 2018, vol 792, cols 867ff.

251 Memorandum (n 184).

252 Memorandum (n 184) para 5.

institutional relationship with the Lord Chancellor and Ministry that we have seen, we find reinforcement of the case for further change to accompany the revised funding model.

F. Summary

Sir Geoffrey Palmer, in delivering the Commission’s 2015 Scarman Lecture, emphasised that ‘To progress any law reform project requires political commitment, sufficient resources and parliamentary time. To secure these, remorseless advocacy must be engaged in.’ The above analysis shows that, while there continue to be eventual and individual successes with Law Commission reports, there are severe problems. The engagements with and responses to individual reports are episodic and erratic. As the reviews mentioned earlier found, the Commission makes excellent use of limited resources from the public purse, taking on technical projects that would otherwise not receive attention, and engaging a wide range of stakeholders through its consultation processes to produce recommendations for reform. The Commission and the public are entitled to know that law reform proposals have been given meaningful consideration and what the reasons are for a decision, whether to proceed, not to proceed, or not to proceed yet.

As things stand, the Commission does not have its next Chair, has not been able to agree its next programme of reform with Government, and we have gone five years without the Lord Chancellor meeting his annual obligation to report to Parliament. The mechanisms that are in place to structure our approach to law reform are vulnerable. Taken together, these problems represent a fundamental challenge to institutional law reform, because the existing framework within which the Commission operates depends on both formal and substantive respect for the Commission as an institution. The ‘remorseless advocacy’ for reform is not being listened to.

7. Conclusions

We may talk of our excellent institutions, and excellent they certainly are, though I could wish we were not given to so much Pharasaical praising of...

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them; but if, while others, who do more and talk less, go on improving their laws, we stand still, and suffer all our worst abuses to continue, we shall soon cease to be respected by our neighbours, or to receive any praises save those we are so ready to lavish upon ourselves.255

So spoke Brougham in his marathon parliamentary speech. In a similar spirit, this article has looked back over 58 years and (almost) 14 programmes of reform; it looks to now, and how the Commission approaches its current projects; and looks forward to how law reform may work in the future. I have interrogated the language of law reform—the way we talk about legal change, and what we talk about when we talk about changing the law. As I have argued, reviewing the rhetoric of law reform illuminates key themes about the present state of our institutions and our assessment of their excellence.

I have offered some recommendations256 for things to change and be changed. Some go to governmental engagement with and enthusiasm for the process of law reform and renewal. There are practical points, relating to caution over how the Law Commission frames projects; but there are also matters of institutional and constitutional importance engaged as well. The rhetoric of modernisation can be a limiting framework for the fate of projects, both in terms of the conclusions reached and in terms of how successful such reforms are perceived to be, and have been, by the different audiences which the Commission has. With respect to the development of the law, understanding the relevance (or not) of the passage of time makes a difference to our thinking. This point matters to law reform agencies, but it also applies to all of us who make legal arguments—as lawyers, as citizens, as academics, as students. When, in making a case or argument for reform, we highlight aged legislation or case law, is it merely a rhetorical device, or can we identify specific social, political, technological changes which are relevant?

Writing of Brougham’s activity in the mid-nineteenth century, Lobban has observed that ‘in the sphere of law reform, where the government was often either apathetic or disorganized, the progress of reform could depend largely on the energy and application of pressure groups and political outsiders’.257 Similarly, Kirby has spoken of ‘the champions

255  Brougham (n 30) 178. See also Marshall (n 20) 776 and Hughes Parry (n 20) 2.
256  For further specific recommendations for the Law Commission and Scottish Law Commission, see Wilson Stark (n 6), ch 7.
257  Lobban, ‘Henry Brougham and Law Reform’ (n 32) 1214.
who can ultimately help ensure that distracted, hard working ministers and officials give attention to the often unsexy problems of law reform that are otherwise prone to be neglected’. Specific projects need their champions, but I have demonstrated that at this moment the very idea of independent, institutional law reform needs its champions too. I have tried not to indulge in too much Phrasical praise, but I share Brougham’s view of the urgent need to take reform seriously. Currently, our system of law reform is precarious: it is time to make a change.

258 M Kirby, ‘Changing Fashions and Enduring Values in Law Reform’ in Reforming Law Reform (n 40) 39. See also HL Deb 12 May 2014, vol 753, col 436. Lord Hodgson of Astley Abbotts: ‘Are those Bills going to have the regulars of the saloon bar of the Dog and Duck dancing on the tables? No, they are not, but they are individually going to make a significant difference in their specialist areas’. 